Supreme Court of the United States

October Term, 1956

No. 445

LAKE TANKERS CORPORATION,
Petitioner,

against

LILLIAN M. HENN, Admx.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. The amount of the first interim stipulation was proper.

Respondent claims that petitioner "wrongly shaped the proceedings from the beginning by filing a bond only for the tug" (p. 28) "because it knew that it was charged with negligence in the operation of the barge as well as of the tug" (p. 16). There is no proper basis for these assertions. When the petition was filed respondent had made no separate charge of negligence in the operation of the barge. Respondent's complaint, which was petitioner's only source of knowledge as to the basis of her claim when the petition was filed, makes no separate claim against the barge. The allegation was that the collision occurred

> "* * * solely through the negligence of Lake Tankers Corporation, by its agents, servants, employees, officers and crew in charge of the operation, management and control of said tug and barge, and of the defendant Clyde Roan, said vessel BLACKSTONE and the said barge as pushed by the said diesel tug were caused to collide and come together" (R. 20).

The only separate mention of the barge was "as pushed by the said diesel tug". Petitioner knew, as the petition later alleged, that the barge was without motive power of her own and was under the control of the tug, and that petitioner's "officers and crew in charge of the operation, management and control of said tug and barge" were the officers and crew of the tug. Since respondent's complaint made no separate allegation of negligence against the barge, or against any one claimed to have been in charge of her other than the tug's crew, respondent is quite wrong in contending that petitioner knew it was charged with negligence in the operation of the barge separately from the tug. Respondent first advanced this claim in the affidavit filed in support of her exceptions on the ground that the first stipulation was inadequate (R. 17).

The law is well settled that there is no liability on the part of a barge wholly under the control of the tug, unless she commits some personal fault of her own, separate and apart from that of the tug. *Sturgis* v. *Boyer*, 24 How. (65 U. S.) 110, 122; *Liverpool etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48 (and other cases cited on page 7 of petitioner's main brief). Therefore, there was then no need to give bond for the barge. However, petitioner did anticipate the possibility of a claim against the barge and, in its petition, not only alleged its readiness to give bond for the value of its interest in the tug, but, also, for "such additional interest as may be appropriate,

whenever the same shall be ordered by the Court" (R. 4). Thus respondent fails in the argument that this proceeding was "wrongly shaped."

II. Petitioner does not admit liability by claiming limitation.

Respondent argues that the claim of limitation of liability is one of confession and avoidance and that the fault of each of the vessels is to be taken for granted, citing *Southern Pacific Co. v. United States*, 72 F. 2d 212 (2 Cir.) and *Petition of United States*, 178 F. 2d 243 (2 Cir.) (pp. 9-10, 30). But this is true only where liability is admitted or after liability has been established at trial. In both cases cited by respondent liability had been determined before the point now referred to was discussed. Nevertheless, respondent's whole argument seems based upon the misconception that, even at this preliminary stage in the proceeding, fault on the part of both tug and barge must be presumed. This is the basis of her argument that there already are two funds. Plainly this is not so. Admiralty Rule 53 expressly provides that "the petitioner shall be at liberty to contest his liability, or the liability of said vessel". Petitioner has done so in this case. See Articles Fourth and Tenth of the petition (R. 2-4). The District Court recognized this from the beginning. See opinion of Ryan, J. (R. 21-22).

III. The adequacy of the limitation fund is not established.

Respondent makes no attempt to meet petitioner's argument that a limitation proceeding may properly be begun, and other suits restrained, if, when it is begun, the claims exceed the possible fund.

Nor does respondent deny that, when this petition was filed, the claims against petitioner amounted to more than double the value of tug and barge put together.

Nor does respondent attempt to dispute petitioner's point that, once jurisdiction has attached, it is not subject to defeasance by claimants' reducing their claims.

Respondent's argument is based on the premise that the fund will be adequate and begs the question. There is not yet any fund. The claims aggregate $259,525, more than either the tug or the barge is worth. It can not now be said that the fund will surely exceed the claims unless this single proceeding must be considered as if it were two, with separate funds for tug and barge, and unless respondent's cause of the action is split and allocated part to each—and that is the question presented here. Respondent's position on this question is wholly theoretical. It exalts the concept of the juristic entity of tug and barge, and ignores the fact that petitioner is the only juristic person in court, and that the claims, said to be asserted against tug and barge, are in fact directed against petitioner *in personam* and its general funds.

IV. Concursus.

Although arguing that concursus is generally abhorrent, respondent makes no attempt to meet the argument, at pages 17-20 of petitioner's brief, that in four out of the five possible situations in which the shipowner may invoke the Act without there being an inadequate fund, the Court will take and keep jurisdiction. Indeed, The Court of Appeals for the Second Circuit is apparently willing, if asked, to look outside the Limitation Act for authority to require a concursus where the claims do not exceed the fund. In *Petition of Trinidad Corporation*, 229 F. 2d 423, the opinion concludes:

> "We conclude with this final caveat as to the scope of this opinion. In holding that the limitation statute

> confers no power on the district court to maintain a concourse once it has found that the fund is adequate, we do not hold that the court is without power derived from other sources in a proper case to enjoin a multiplicity of actions. For this appeal has been pitched solely on the effect of the limitation statute" (p. 431).

The Court may have had in mind a bill of peace, which still survives with notable vitality. See *Yuba Consolidated Gold Fields* v. *Kilkeary*, 206 F. 2d 884 (9 Cir.), and Pomeroy, Equity Jurisprudence, 5th Ed. 1941, Vol. 1, Sec. 269.

Respondent's argument that it is merely a matter of judicial discretion whether to vacate the injunction as to her also begs the question because it assumes that the fund must inevitably exceed the claims (p. 10). The only case in which this Court has held it to be a matter of discretion is *Langnes* v. *Green*, 282 U. S. 531, a single claim case discussed at pp. 25-28 of petitioner's main brief.

V. Prosecution of the State Court action would violate the Admiralty Court's exclusive jurisdiction of limitation questions.

Although arguing otherwise (pp. 28-33), respondent concedes the point that demonstrates that the prosecution of her State Court action must be nugatory. She agrees

> "* * * that the Admiralty Court has exclusive jurisdiction of all questions affecting limitation and that the amount of the fund is exclusively for the Admiralty Court to administer" (p. 30).

The yardstick for the amount of the fund is the individual liability of tug and/or barge (petitioner's main brief, p. 7). Respondent concedes, therefore, that the fixing of such liability "is exclusively for the Admiralty Court". But if she prosecutes her State Court action,

and if petitioner is held for negligence of both tug and barge, the fund must equal the value of both; but since, as respondent now concedes, the amount of the fund is exclusively for the Admiralty Court to determine, only the Admiralty Court can determine in any binding way whether the tug and/or the barge is guilty of separate fault. We have discussed this question at pages 33-37 of our main brief.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the restraining order reinstated.

Dated: New York, N. Y., April 30, 1957.

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